Kinu Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(C)(A)-523–08 OF 2024
LEE SWEE SENG, WONG KIAN KHEONG AND AHMAD FAIRUZ ZAINOL ABIDIN JJCA
9 JUNE 2025

Building and Construction Law — Subcontracts — Direct payments to subcontractor — Subcontractor brought adjudication action against main contractor — Subcontractor obtained adjudication decision in its favour — Subcontractor claimed direct payments from principal pursuant to s 30 of Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Money 'due or payable' by principal to main contractor — Whether principal may refuse to make payment under s 30 of CIPAA on ground that it had not given its written consent to main contractor to appoint subcontractor — Whether principal may refuse payment on ground that payment had been made to main contractor under specific interim payment certificate relating to work done by subcontractor — Whether retention sum retained by principal from certified amounts due to main contractor was money 'due or payable' to main contractor from principal which satisfied requirement of s 30(5) of the CIPAA — Construction Industry Payment and Adjudication Act 2012 ss 4 & 30

The Government of Malaysia (Malaysian Public Works Department ('JKR')) ('the respondent/the principal') had appointed NSB as the main contractor for a construction project and NSB subsequently appointed Kinu Sdn Bhd ('the appellant/the subcontractor') as the subcontractor. There was a dispute arose between NSB and the appellant and such dispute ended with an adjudication decision in favour of the appellant. The appellant then filed an application under s 30 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for an order to compel the principal (employer) to make direct payment to it on account of money 'due or payable' by the principal to the main contractor. The High Court dismissed the appellant's application, hence, the present appeal. The issues that arose for the court's determination were: (a) whether the principal may refuse to make payment under s 30 of the CIPAA on ground that it had not given its written consent to the main contractor to appoint the subcontractor; (b) whether the principal may refuse to make such payment on ground that the payment had been made to the main contractor under a specific interim payment certificate ('IPC') relating to work done by the subcontractor; and (c) whether retention sum retained by the principal from certified amounts due to the main contractor was money 'due or payable'

to the main contractor from the principal which satisfied the requirement of s 30(5) of the CIPAA.

Held, allowing the appeal with costs of RM20,000 here and below:

(1) The definition of 'principal' in s 4 of the CIPAA had no reference to the need for the subcontractor to be one that the principal had consented in writing to its appointment by its main contractor. In this regard, the court agreed with the High Court that: (a) JKR came within the definition of 'principal' under s 4 of the CIPAA application and that JKR was the principal of NSB which in turn had contracted with the appellant as its subcontractor; and (b) cl 40.2 of the contract between NSB and JKR (which stated that to subcontract the works, NSB was required to obtain JKR's written consent) was merely a contractual arrangement between them and that could not override a specific statutory provision like ss 4 and 30(5) of the CIPAA. In relation to 'Surat Pekeliling Perbendaharaan Bil 4 Tahun 2003', the court was of the view that the Executive could not issue internal circulars or directives which may have the effect of nullifying that which was expressly permitted by the legislature under an Act of Parliament. The principal could not write and read into s 30 of the CIPAA words and requirements that were not there so as to obviate its need to pay direct to the subcontractor if it was found that there was money due or payable by the principal to the main contractor against whom the adjudication decision was made under s 30(5) (see paras 13, 17, 19, 21 & 27).

(2) Section 30 of the CIPAA did not state that the amount sought for payment by the subcontractor from the principal must be confined to the IPC in relation to work done by the subcontractor for the main contractor. There was no reasonable rationale to confine the subcontractor's claim to a particular IPC under which the main contractor was to in turn pay the subcontractor. So long as there was money 'due or payable' by the principal to the main contractor under a chain of construction contracts, the principal suffered no detriment because what the principal was required to pay out may be recovered as 'a debt or set off the same from any money due or payable by the principal' from its main contractor. After all the principal was the ultimate beneficiary of the work done by the subcontractor and the subcontractor would have been compensated to the extent of the sum of money 'due or payable' by the principal to the main contractor not exceeding the adjudicated amount (see paras 33–34 & 36).

(3) JKR was conspicuously coy about the certificate of termination costs ('the said certificate') generally prepared soon after the additional costs to engage a rescue contractor could be determined to complete the balance 0.14% of the works. However, no explanation was forthcoming in JKR's

affidavits as to why the said certificate could not be prepared. In the absence of cogent reasons why JKR had not been able to finalise or had not exhibited the said certificate after some 18 months had passed since it terminated the contract with NSB, the court must draw an adverse inference against JKR (see paras 73–74 & 83).

(4) When a written request was made on the principal under s 30(1) of the CIPAA to pay direct to the subcontractor, at that point the principal must have an actionable debt in existence and payable to the principal from the main contractor from which it may set off what it owed the main contractor under the retention sum of performance guarantee sum. There was no evidence of an ascertained sum arising from either defects to be rectified and additional costs required to employ the rescue contractor for the balance 0.14% of the works before one may know how much of the performance guarantee sum was needed to be utilised for this purpose (see para 101).

(5) Upon the main contractor terminating the subcontractor for the reason that the principal had terminated the main contractor, the subcontractor had the right to demand for the release of the retention sum of RM927,300 which sum was allowed by the adjudicator in the adjudication decision. The undisputed retention sum of RM6,269,518.98 retained by the principal would be more than enough to satisfy the adjudicated amount together with interest and costs. The appellant as the subcontractor who did the works deserved to have the retention sum released because there had been no complaint of any defective works and had no role in the 0.14% of the uncompleted works. Parliament had thus allowed so much of the amount payable from the principal to the main contractor to be attached for direct payment to the subcontractor (see paras 114–115).

(6) The court was more than satisfied for the reasons given above that JKR had not discharged its evidential burden of showing that there was no money 'due or payable' to the main contractor NSB which the appellant may attach for so much as was represented in the adjudicated amount in the adjudication decision that it had obtained against the main contractor and for which it had also enforced as a judgment of the High Court under s 28 of the CIPAA (see para 123).

[Bahasa Malaysia summary

Kerajaan Malaysia (Jabatan Kerja Raya Malaysia ('JKR')) ('responden/prinsipal') telah melantik NSB sebagai kontraktor utama bagi suatu projek pembinaan dan NSB kemudiannya melantik Kinu Sdn Bhd ('perayu/subkontraktor') sebagai subkontraktor. Terdapat pertikaian yang timbul antara NSB dan perayu dan pertikaian tersebut berakhir dengan keputusan adjudikasi yang memihak kepada perayu. Perayu kemudiannya

memfailkan permohonan di bawah s 30 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk mendapatkan suatu perintah bagi memaksa prinsipal (majikan) membuat pembayaran terus kepadanya atas sebab wang 'terhutang atau kena dibayar' oleh prinsipal kepada kontraktor utama. Mahkamah Tinggi menolak permohonan perayu, justeru, rayuan semasa. Isu-isu yang timbul untuk penentuan mahkamah adalah: (a) sama ada prinsipal boleh enggan membuat pembayaran di bawah s 30 APAIP atas alasan ia tidak memberikan persetujuan bertulis kepada kontraktor utama untuk melantik subkontraktor; (b) sama ada prinsipal boleh enggan membuat bayaran sedemikian atas alasan bahawa pembayaran telah dibuat kepada kontraktor utama di bawah sijil bayaran interim ('SBI') khusus yang berkaitan dengan kerja yang dilakukan oleh subkontraktor; dan (c) sama ada jumlah tahanan yang dikekalkan oleh prinsipal daripada jumlah yang diperakui terhutang kepada kontraktor utama adalah wang 'terhutang atau kena dibayar' kepada kontraktor utama daripada prinsipal yang memenuhi keperluan s 30(5) APAIP.

Diputuskan, membenarkan rayuan dengan kos RM20,000 di sini dan di bawah:

(1) Takrifan 'prinsipal' dalam s 4 APAIP tidak merujuk kepada keperluan agar subkontraktor yang dilantik oleh kontraktor utama adalah subkontraktor yang dipersetujui secara bertulis oleh prinsipal. Dalam hal ini, mahkamah bersetuju dengan Mahkamah Tinggi bahawa: (a) JKR termasuk dalam takrifan 'prinsipal' di bawah s 4 APAIP dan bahawa JKR adalah prinsipal NSB yang seterusnya telah memeterai kontrak dengan perayu sebagai subkontraktornya; dan (b) fasal 40.2 kontrak antara NSB dan JKR (yang menyatakan bahawa untuk mensubkontrakkan kerja-kerja yang berkaitan, NSB dikehendaki mendapatkan persetujuan bertulis JKR) hanyalah pengaturan kontrak antara mereka dan yang tidak boleh mengetepikan peruntukan berkanun tertentu seperti ss 4 dan 30(5) APAIP. Berhubung dengan 'Surat Pekeliling Perbendaharaan Bil 4 Tahun 2003', mahkamah berpendapat bahawa Eksekutif tidak boleh mengeluarkan pekeliling atau arahan dalaman yang mungkin mempunyai kesan membatalkan apa yang dibenarkan secara nyata oleh badan perundangan di bawah Akta Parlimen. Prinsipal tidak boleh menulis dan membaca ke dalam s 30 APAIP perkataan dan keperluan yang tidak ada bagi mengelakkan kewajipannya untuk membayar terus kepada subkontraktor jika didapati terdapat wang yang terhutang atau kena dibayar oleh prinsipal kepada kontraktor utama yang terhadapnya keputusan adjudikasi dibuat di bawah s 30(5) (lihat perenggan 13, 17, 19, 21 & 27).

(2) Seksyen 30 APAIP tidak menyatakan bahawa jumlah yang diminta untuk bayaran oleh subkontraktor daripada prinsipal haruslah terhad kepada SBI berhubung dengan kerja yang dilakukan oleh subkontraktor

untuk kontraktor utama. Tiada rasional yang munasabah untuk mengehadkan tuntutan subkontraktor kepada SBI tertentu di mana kontraktor utama perlu membayar subkontraktor tersebut. Selagi terdapat wang yang 'terhutang atau kena dibayar' oleh prinsipal kepada kontraktor utama di bawah rantaian kontrak pembinaan, prinsipal tidak mengalami apa-apa kerugian kerana apa yang perlu dibayar oleh prinsipal boleh diperolehi semula sebagai 'hutang atau tolak amaun itu daripada apa-apa wang yang terhutang atau kena dibayar oleh prinsipal' daripada kontraktor utamanya. Lagipun prinsipal adalah benefisiari utama kerja yang dilakukan oleh subkontraktor dan subkontraktor tersebut akan diberi pampasan setakat jumlah wang yang 'terhutang atau kena dibayar' oleh prinsipal kepada kontraktor utama yang tidak melebihi jumlah yang diadjudikasikan (lihat perenggan 33–34 & 36).

(3) JKR jelas teragak-agak tentang perakuan kos penamatan ('perakuan tersebut') yang biasanya disediakan sejurus selepas kos tambahan untuk melantik kontraktor penyelamat dapat ditentukan untuk menyiapkan baki 0.14% kerja. Bagaimanapun, tiada penjelasan dikeluarkan dalam afidavit JKR tentang mengapa perakuan tersebut tidak dapat disediakan. Memandangkan tiada sebab yang kukuh mengapa JKR tidak dapat memuktamadkan atau tidak mengemukakan perakuan tersebut selepas kira-kira 18 bulan berlalu sejak ia menamatkan kontrak dengan NSB, mahkamah harus membuat inferens bertentangan terhadap JKR (lihat perenggan 73–74 & 83).

(4) Apabila permintaan bertulis dibuat ke atas prinsipal di bawah s 30(1) APAIP untuk membayar terus kepada subkontraktor, pada ketika itu prinsipal semestinya mempunyai hutang yang boleh diambil tindakan dan kena dibayar kepada prinsipal daripada kontraktor utama yang mana ia boleh menolak jumlah hutang kontraktor utama di bawah jumlah tahanan daripada jumlah jaminan prestasi. Tiada keterangan berkenaan jumlah yang ditetapkan yang timbul daripada kecacatan yang perlu diperbaiki dan juga kos tambahan yang diperlukan untuk menggaji kontraktor penyelamat untuk baki 0.14% daripada kerja-kerja tersebut sebelum seseorang boleh mengetahui berapa banyak jumlah jaminan prestasi yang diperlukan untuk digunakan untuk tujuan ini (lihat perenggan 101).

(5) Apabila kontraktor utama menamatkan subkontraktor atas sebab prinsipal telah menamatkan kontraktor utama, subkontraktor mempunyai hak untuk menuntut pelepasan jumlah tahanan sebanyak RM927,300 yang mana jumlah tersebut dibenarkan oleh adjudikator dalam keputusan adjudikasi. Jumlah tahanan yang tidak dipertikaikan sebanyak RM6,269,518.98 yang disimpan oleh prinsipal adalah lebih daripada mencukupi untuk memenuhi jumlah yang diadjudikasikan berserta faedah dan kos. Perayu sebagai subkontraktor yang melakukan

kerja-kerja tersebut layak untuk mendapatkan jumlah tahanan tersebut kerana tiada aduan mengenai apa-apa kecacatan kerja dan ia tidak mempunyai peranan dalam 0.14% daripada kerja-kerja yang belum siap. Oleh itu, Parlimen telah membenarkan sebegitu banyak amaun yang perlu dibayar daripada prinsipal kepada kontraktor utama untuk dilampirkan untuk pembayaran terus kepada subkontraktor (lihat perenggan 114–115).

(6) Berdasarkan alasan-alasan di atas, mahkamah sangat berpuas hati bahawa JKR gagal melepaskan beban keterangannya bagi menunjukkan bahawa tidak ada wang yang 'terhutang atau kena dibayar' kepada kontraktor utama NSB yang boleh dilampirkan oleh perayu sebanyak mana yang dinyatakan dalam jumlah yang diadjudikasikan dalam keputusan adjudikasi tersebut yang diperolehnya terhadap kontraktor utama dan yang mana ia juga telah kuat kuasakan sebagai penghakiman Mahkamah Tinggi di bawah s 28 APAIP (lihat perenggan 123).]

Cases referred to

Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd [2024] 4 MLJ 825; [2024] 7 CLJ 1, CA (refd)

Binamin Mjc Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (encl 26) [2001] MLJU 111; [2001] 6 CLJ 213, HC (distd)

Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311; [2020] 1 LNS 187, HC (refd)

Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case [2020] MLJU 2389, HC (folld)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)

Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal [2017] 4 MLJ 813, CA (refd)

Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd [2021] MLJU 474, HC (refd)

HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case [2021] 8 MLJ 347, HC (refd)

JDI Builtech (M) Sdn Bhd v Danga Jed Development Malaysia Sdn Bhd (previously known as Greenland Danga Bay Sdn Bhd) [2024] 4 MLJ 29, CA (refd)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 8 CLJ 149, FC (refd)

Kasugi Prima Sdn Bhd v Cobrain Holdings Sdn Bhd [2017] MLJU 1953, HC (refd)

Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee) [1988] 1 MLJ 434 (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (refd)

Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, garnishee) [1988] 1 MLJ 444 (refd)
Maybank Islamic Bhd v WWE Holdings Bhd [2017] 4 MLJ 339, CA (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)
Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691, HC (refd)
Pali PTP Sdn Bhd v Bond M&E Sdn Bhd and another appeal [2023] 6 MLJ 176, CA (folld)
PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor [2020] MLJU 118, HC (refd)
Sangkala Sdn Bhd v Bennlim Engineering S/B & Anor [1998] MLJU 648, HC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
WTK Engineering Sdn Bhd v Seriemas Development Sdn Bhd [2021] MLJU 520, HC (refd)
Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, CA (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 4, 28, 28(1), 30, 30(1), (2), (3), (4), (5), Part IV
Contracts Act 1950 s 24(b)
Evidence Act 1950 ss 106, 114(g)
Rules of Court 2012 O 49 r 1

Appeal from: *Kinu Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya)* [2024] MLJU 2543 (High Court, Kuala Lumpur)

Chooi Wai Sing (with Megan Choo Shin) (Chang Chooi & Co) for the appellant.
Zureen Elina Hj Mohd Dom (with Howlette Tan Wei Yip) (Attorney General's Chambers) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This is an appeal from a decision of the High Court that had dismissed a s 30 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') application by the successful claimant ('subcontractor') in an adjudication decision for an order to compel the principal ('employer') to make direct payment to it on account of money 'due or payable' by the principal to the unsuccessful respondent in the adjudication who is the main contractor.

[2] The issues raised in this appeal were whether retention sum retained by the principal from certified amounts due to the main contractor was money 'due or payable' to the main contractor from the principal and whether on the

A balance of probabilities the subcontractor had proved that there was money 'due or payable' from the principal to the main contractor when the request for payment was served on the principal under s 30(1) of the CIPAA.

B **[3]** It was also argued by the principal who is the Government of Malaysia ('GOM') and more particularly Jabatan Kerja Raya ('JKR') that since it did not recognise nor consent to the main contractor appointing the subcontractor, it was not bound to make any payments under s 30 of the CIPAA.

C IN THE HIGH COURT BELOW

[4] The subcontractor KSB was the plaintiff in the High Court below and the appellant here. The GOM/JKR was the defendant below and the respondent here.

D **[5]** The High Court held that the liability of the principal to pay if there is a debt due or payable from it to the main contractor is irrespective of whether the subcontractor is recognised or approved by the principal as this is not a requirement under s 30 of the CIPAA.

E **[6]** The High Court was satisfied that there was no money 'due or payable' from the principal to the main contractor, the losing party in the adjudication as the last interim payment certificate ('IPC') in IPC No 84 showed a negative sum of RM1,788,581.24 as the recommended amount for payment by the F GOM to NSB, the main contractor.

[7] The High Court had further held that there was an issue as to whether there was a debt due or payable from the principal to the main contractor in that there was a dispute as to whether the percentage of works completed at the G point of termination of the contract by the principal of the main contractor was physical or financial completion. The High Court held that such a dispute was essentially to be resolved between JKR and its main contractor NSB.

H **[8]** The High Court had thus dismissed the plaintiff's/subcontractor's application under s 30 of the CIPAA. The plaintiff had appealed to the Court of Appeal.

BEFORE THE COURT OF APPEAL

I **[9]** The plaintiff appealed to the Court of Appeal on the ground that the plaintiff had proved on the balance of probabilities that there was money 'due or payable' from JKR to the main contractor NSB which money was more than enough to satisfy the adjudicated amount that the plaintiff had obtained and enforced against the main contractor.

[10] The plaintiff argued that the High Court had erred when it failed to consider that the performance guarantee sum carved out from the IPCs due from JKR to its main contractor to the sum of 5% of contract sum of the project was money 'payable' within the meaning of s 30(5) of the CIPAA.

[11] The plaintiff further contended that the difference between the progress of the works under the last IPC which was IPC No 84 dated 24 June 2022 and that stated as 99.86% in the notice of termination dated 14 July 2022, represented money due or payable from JKR to the main contractor and that this was not a matter that could only be resolved in a dispute between JKR and NSB but rather it was to be resolved based on the evidence adduced under a s 30 of the CIPAA application on the balance of probabilities.

WHETHER THE PRINCIPAL MAY REFUSE PAYMENT UNDER A S 30 OF THE CIPAA APPLICATION ON GROUND THAT IT HAD NOT GIVEN ITS WRITTEN CONSENT TO THE MAIN CONTRACTOR APPOINTING THE SUBCONTRACTOR

[12] The principal had referred to the fact that its main contractor NSB had appointed the subcontractor without the principal's written consent and that this is in breach of cl 40 of the PWD Form DB (Rev 1/2010) Contract ('the PWD contract') for the construction of a hospital in Dungun, Terengganu with 110 beds and related works ('the project'). The principal contended that as it does not recognise the subcontractor and the subcontracting, there is thus no chain of construction contracts between the subcontractor, main contractor and the principal employer.

[13] With respect, that interpretation is misplaced as the definition of 'principal' in s 4 of the CIPAA has no reference to the need for the subcontractor to be one that the principal has consented in writing to its appointment by its main contractor. This is self-evident from the definition of 'principal' itself as follows:

> 'principal' means a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts.

[14] The fact that the JKR had contracted with the main contractor NSB is admitted by JKR. JKR is ordinarily liable to pay its main contractor for work done for the project. The main contractor had in turn contracted with and is liable to pay its subcontractor in a chain of construction contracts. There is no reference to nor requirement that the principal must first have given its written consent to the main contractor appointing its subcontractor.

[15] The relevance of whether the defendant as JKR qualifies to be a

'principal' as defined above is relevant to the application of s 30(1) of the CIPAA which reads:

> If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request *for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made*. (Emphasis added.)

[16] Parties cannot contract out of the application of CIPAA as to allow that would be to nullify the legislative intent of Parliament in purposefully crafting and enacting the CIPAA, as stated in its long title, to 'facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'.

[17] We were referred to *Surat Pekeliling Perbendaharaan Bil 4 Tahun 2003* which is a mere internal administrative circular of the Ministry of Finance with respect to circumstances under which direct payments may be made to nominated subcontractors but surely that cannot stand in the way of an Act of Parliament in the CIPAA and any court order directing payment from the principal to the subcontractor would prevail over an internal circular. The Executive cannot issue internal circulars or directives which may have the effect of nullifying that which is expressly permitted by the Legislature under an Act of Parliament.

[18] We are in total agreement with the High Court when it held at para [29] of its grounds of judgment ('GOJ') that 'At most, the said *Surat Pekeliling* is an internal requirement or rule of procedure which only binds JKR and that it has nothing to with KSB who is not and cannot be bound by the same'.

[19] Likewise, we were referred to cll 40.1 and 40.2 of the contract which reads:

> 40.1 The Contractor shall not without the prior written consent of the P.D (which consent shall not be unreasonably delayed or withheld) sub-contract the design for all or any portion of the Works. Where the P.D consents to any sub-contract under this clause, such consent shall not in any way absolve the obligations of the Contractor under clause 14.1(a).
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> 40.2 The Contractor shall not sub-contract the whole or any substantial part of the Works without the prior written consent of the P.D (which consent shall not be unreasonably delayed or withheld). Any such consent, if given, shall not relieve the Contractor from any liability or obligation under this Contract and he shall be responsible for the due observance by such sub-contractors, of all the terms, stipulations and conditions under this Contract.

[20] The remedy of the defendant is to exercise its right under clause where the PD ('project director') shall have the right to instruct the contractor to forthwith terminate such subcontract. A

[21] We are thus in agreement with the High Court when it held at paras [24]–[25] that JKR comes within the definition of 'principal' under s 4 of the CIPAA application and that JKR is the principal of NSB which in turn had contracted with KSB, the plaintiff, as its subcontractor. The High Court further held at para [26] that cl 40.2 of the contract is merely a contractual arrangement between NSB and JKR and that cannot override a specific statutory provision like s 4 of the CIPAA and if we may add, for that matter s 30(5) of the CIPAA. B C

[22] The intention of Parliament to apply the CIPAA to all 'construction contracts in writing' across the board to all and sundry and irrespective of whether it is a private or public sector construction contract with no exemption can be clearly seen in its declaration in s 2 of the CIPAA as follows: D

> This Act *applies to every construction contract made in writing* relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government. (Emphasis added.) E

[23] In *Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd* [2024] 4 MLJ 825; [2024] 7 CLJ 1 the Court of Appeal observed as follows:

> [73] The word 'every' in 'every construction contract' in s 2 of the CIPAA simply means what it says ie to each and every construction contract as in none are excluded other than those that do not apply by virtue of s 3 of the CIPAA or exempted under s 40. The CIPAA thus applies to all construction contracts unless excluded under s 3 or exempted under s 40 of the CIPAA. To allow further a contractual exclusion or exemption would be to allow an employer by the stroke of a pen to defeat and bring to nought the whole purpose of the CIPAA. F G
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> [74] Quite apart from the intention of Parliament, the court cannot read 'every' in s 2 of the CIPAA to be 'every' for so long as the parties have not contractually excluded it. Section 2 must be read to give meaning to each and every word therein and not to disregard it on ground of parties so-called consensual exclusion. Thus, in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 the Supreme Court observed as follows: H
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> > ... *The court however is not at liberty to treat words in a statute as mere tautology or surplusage* unless they are wholly meaningless. *On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment*, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. (Emphasis added.) I
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> [75] To allow an exception to be carved out from a clear declaration of Parliament's

A intent that the CIPAA is to apply to 'every construction contract' which is not excluded or exempted in the CIPAA would be to do violence to the words used and more so when an opposite meaning is imposed through interpretation. One cannot impose a meaning on s 2 of the CIPAA to say that the CIPAA does not apply to parties who had provided otherwise in their contract. (Emphasis added.)

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[24] See also the cases of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 and *Kasugi Prima Sdn Bhd v Cobrain Holdings Sdn Bhd* [2017] MLJU 1953.

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[25] Whilst there is nothing wrong to require a written consent from the principal before a main contractor may appoint a subcontractor, the principal cannot rely on the absence of a written consent to nullify s 30 of the CIPAA on account of the fact that it does not recognise the subcontractor or that such a subcontracting is a breach of its contract with its main contractor. The whole rationale behind a s 30 of the CIPAA direct payment from the principal to the subcontractor is to ensure that the party that has done the work ultimately for the benefit of the principal is paid if there is money due or payable from the principal to the main contractor.

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[26] The amount paid by the principal is recoverable from the main contractor either as a debt or a set off. In an ideal world, no one who has done work should be deprived of payment. Where the main contractor that is liable to pay has not made payment, the subcontractor with an adjudication decision in its favour is allowed to call on the principal to pay provided there is money due or payable from the principal to the main contractor.

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[27] The principal cannot write and read into s 30 of the CIPAA words and requirements that are not there so as to obviate its need to pay direct to the subcontractor if it is found that there is money due or payable by the principal to the main contractor against whom the adjudication decision was made under s 30(5).

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[28] Section 24(b) of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful, unless '(b) it is of such a nature that, if permitted, it would defeat any law'. Thus, if a party were to contract in such a manner as to nullify or defeat the provisions of an Act then it can be said that to allow such a provision would be repugnant to the purpose of the Act and the court would have to strike down the provision of the contract that has such an effect. See *Sangkala Sdn Bhd v Bennlim Engineering S/B & Anor* [1998] MLJU 648 and the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619. In the instant case it would be to interpret and hold that cl 40 of the PWD contract that prohibited subcontracting without the written consent of the principal to

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be of no effect in preventing the application of s 30 of the CIPAA to the principal.

[29] In the light of the above, the argument of JKR that there is no privity of contract and so no requirement to make direct payment as envisaged in the *Surat Pekeliling Perbendaharaan* would also fall as it cannot stand against what is essentially a statutory remedy akin to a garnishment as provided for under s 30 of the CIPAA. In *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits* [2016] MLJU 691 it was, held that there was no requirement for the principal and the successful party in the adjudication to have any contractual relationship, and that it was not relevant whether the principal has knowledge of the adjudication and the matters raised in the adjudication proceedings between its main contractor and the subcontractor as the successful party in the adjudication. That is done and dusted and thus should not be allowed to distract the High Court in determining if there is money 'due or payable' from the principal to its main contractor which is the central issue here.

[30] In fact, JKR had not cross-appealed against this particular finding of fact and law of the High Court and thus cannot raise this issue of JKR not being a principal under a chain of construction contracts that is susceptible to a s 30 of the CIPAA application for direct payment from the principal to the subcontractor. See the Federal Court case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149.

WHETHER THE PRINCIPAL MAY REFUSE PAYMENT ON GROUNDS THAT THE PAYMENT HAD BEEN MADE TO THE MAIN CONTRACTOR UNDER A SPECIFIC IPC RELATING TO WORK DONE BY THE SUBCONTRACTOR

[31] JKR sought to argue that KSB's work was in relation to the 'Design, Supply, Delivery and Installation of Industrial Building System ('IBS') works including Concrete Topping and RC Structure Works' for the project. As that had been paid in full vide *Perakuan Bayaran Interim* or IPC No 11–28 and 78–79, there is no money 'due or owing' from JKR to NSB.

[32] In *Murni Environmental* Her Ladyship See Mee Chun J (later JCA) held that it was not necessary that the money due or payable by the principal to the unsuccessful party should be in reference to the claim made by the successful party in the adjudication to the progress claim in question. So long as there was money due or payable by the principal to the unsuccessful party, that money shall be paid to the successful party. The principal may then recover the said amount paid as a debt or set off from any money due or payable to the unsuccessful party pursuant to s 30(4) of the CIPAA. Her Ladyship held as

follows:

> [16] Further s 30(5) of the CIPAA does not require that the money due and payable by D2 as the principal to D1 being the party against whom the adjudication decision was made should be in reference to the claim made by Plaintiff to the progress claim in question. So long *there is money due and owing by D2 to D1, that money shall be paid to Plaintiff and D2 may recover the said paid amount as a debt or set off from any money due or payable to D1 pursuant to* s 30(4) of the CIPAA. (Emphasis added.)

[33] Again, such an interpretation is consistent with not reading into s 30 of the CIPAA words or requirements that are not there. Nowhere is it stated that the amount sought for payment by the subcontractor from the principal must be confined to the IPC in relation to work done by the subcontractor for the main contractor.

[34] There is no reasonable rationale to confine the subcontractor's claim to a particular IPC under which the main contractor is to in turn pay the subcontractor. Section 30(2)–(5) of the CIPAA reads:

> (2) Upon receipt of the written request under subsection (1), *the principal shall serve a notice in writing* on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.
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> (3) In the absence of proof of payment requested under subsection (2), *the principal shall pay the adjudicated amount* to the party who obtained the adjudication decision in his favour.
>
> (4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.
>
> (5) *This section shall only be invoked if money is due or payable by the principal* to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1). (Emphasis added.)

[35] Section 30(3) does not that say that the principal shall pay the adjudicated amount as identified by an interim progress certificate for the work done for which payment had not been made. Section 30(5) does not require that the money 'due or payable' must be arising from an interim progress certificate representing the work done by the subcontractor and not otherwise.

[36] So long as there is money 'due or payable' by the principal to the main contractor under a chain of construction contracts, the principal suffers no detriment because what the principal is required to pay out may be recovered as 'a debt or set off the same from any money due or payable by the principal' from its main contractor. After all it is the ultimate beneficiary of the work done by

the subcontractor and the subcontractor would have been compensated to the extent of the sum of money 'due or payable' by the principal to the main contractor not exceeding the adjudicated amount.

[37] As is often the case, the anomaly and aberration happen when what the main contractor received is not paid over to its subcontractor or that the principal is deducting at source what it says its main contractor owes either because of delay caused by the main contractor for which the principal would impose LAD as per the contract and in the event of a termination by the principal, it would seek to forfeit the whole of the performance guarantee sum, which in this case was deducted every 10% from each IPC until a sum of 5% of the contract sum is retained.

[38] Such is the scenario that we shall explore in weighing the evidence adduced and considering the probabilities of the assertions and counter-assertions to ascertain if there is 'money due or payable' by the principal JKR to its main contractor NSB.

WHETHER THERE IS MONEY 'DUE OR PAYABLE' FROM THE PRINCIPAL TO THE MAIN CONTRACTOR TO SATISFY THE REQUIREMENT OF S 30(5) OF THE CIPAA

[39] Before the filing of an application under s 30 of the CIPAA vide originating summons ('OS') in the High Court below No WA-24C-202–12 of 2023, the plaintiff had obtained an adjudication decision in its favour against the main contractor NSB on 13 July 2023 wherein NSB was required to pay the adjudicated amount of RM927,300.00 together with interest at the rate of 5%pa on the adjudicated sum calculated from 13 April 2023 till date of settlement and costs of RM43,487.02 (collectively called the 'adjudicated sum').

[40] NSB failed to set aside the adjudication decision in the High Court and KSB's application in the High Court to enforce the adjudication decision under s 28 of the CIPAA was allowed on 7 November 2023.

[41] The plaintiff, through its solicitors, in compliance with the requirement of s 30(1) of the CIPAA issued a written request dated 11 September 2023 to the principal JKR to seek direct payment of the adjudicated sum. The plaintiff could do so even before the enforcement of the adjudication decision under s 28 was obtained because a s 30 application for direct payment from the principal is a mode of enforcement of an adjudication decision. The fact that an enforcement order had been obtained to enable the adjudication decision to be enforced as if it is a judgment of the High Court would further enhance a s 30 application at least to the extent that the

adjudication decision has been converted into a judgment of the High Court.

[42] The plaintiff specifically referred to s 30 of the CIPAA and in particular s 30(2) under which '*the principal shall serve a notice in writing* on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice'. (Emphasis added.) See encl 4 pp 188–189.

[43] JKR in its response dated 22 September 2023 to the plaintiff's written request for a direct payment, argued that it had no contractual relationship with the plaintiff and thus any payment issues arising between KSB as subcontractor and NSB the main contractor, should be resolved between themselves. See encl 4 pp 190–191.

[44] That as we have set out above, is a misapprehension of the law and the requirements of s 30 of the CIPAA which does not require a privity of contract to begin with but rather that the parties are related to each other under 'a chain of construction contracts' as found in the definition of a 'principal' under s 4.

[45] The plaintiff through its solicitors was constrained to respond to correct this misapprehension by their letter of 25 September 2023 to JKR. They also referred once again to s 30(2) of the CIPAA and requested JKR to show proof that all payments had been settled, particularly proof that the retention sum under JKR's contract with NSB had been paid in full. See pp 192–193 encl 4.

[46] JKR by its letter of 9 October 2023 replied to state that there is no arrears of payment due to NSB and that instead under cl 60.1 of its PWD contract with NSB, JKR will make a claim for costs of termination arising out of its termination of NSB for breach of the contract and that the performance guarantee sum would not be returned to NSB. See pp 194 encl 4.

[47] Before filing the application under s 30 of the CIPAA with the High Court, the plaintiff's solicitors responded to JKR's letter above via their letter of 16 October 2023 stressing the mandatory requirement of s 30(2) with respect to showing to them proof of payment to NSB. The plaintiff's solicitors also said that the progress of the project was at 99.86% before the termination of the contract and as such they would request again from JKR the proof for payment up to 99.86% of the works. See p 195 encl 4.

[48] JKR replied by its letter of 9 November 2023 that the scope of the work with respect to IBS had been fully paid by JKR to NSB by IPC No 79. See pp 196–202 encl 4 enclosure IPC No 79 and the supporting documents.

[49] The plaintiff's solicitors replied by its letter of 21 November 2023 reiterating, as we have rightly held, that payment for IPC No 79 is no proof that that JKR had paid all money 'due or payable' to its main contractor NSB. See pp 203–204 encl 4. The plaintiff thereafter on 5 December 2023 filed the application under s 30 of the CIPAA via the OS, which appeal is before us.

[50] In *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 1 LNS 187, the four conditions to be satisfied for direct payment to be made by the principal to the subcontractor are as follows:

> Condition 1: the main contractor must have failed to pay the adjudicated amount to the subcontractor (ss 30(1) and (3), CIPAA);
>
> Condition 2: the subcontractor made a written request that the principal pay the adjudicated amount directly to the subcontractor (s 30(1), CIPAA);
>
> Condition 3: there was money due or payable from the principal to the main contractor (s 30(5), CIPAA); and
>
> Condition 4: the principal did not comply with the subcontractor's notice and did not pay the adjudicated amount directly to the subcontractor.

[51] As stated by the Court of Appeal in *JDI Builtech (M) Sdn Bhd v Danga Jed Development Malaysia Sdn Bhd (previously known as Greenland Danga Bay Sdn Bhd)* [2024] 4 MLJ 29, the initial evidential burden on the plaintiff as a subcontractor in a chain of construction contracts in a s 30 of the CIPAA application is a very light one. It needs only to assert that it had obtained an adjudication decision in its favour and the adjudication amount had not been paid. The relevant adjudication decision should be exhibited and in the instant case, the plaintiff had also obtained an enforcement of the adjudication decision as if it is a judgment of the High Court under s 28 of the CIPAA.

[52] The Court of Appeal in *JDI Builtech*'s case explained as follows:

> [52] ... The legal and initial evidential burden to prove that there is a sum of money due and payable from the principal to the main contractor lies with the subcontractor. We can accept that the subcontractor is entitled to assert that it verily believed that there is such a sum of money owing by virtue of the fact that there would ordinarily be a certificate of progress claim issued by the main contractor to the principal for work done by the subcontractor for the main contractor. As the subcontractor had not been paid, it is entitled to assume that the principal may be owing money to the main contract.
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> [53] That is what is generally the case which is why s 30(2) proceeds with that assumption and it mandates the principal to give a notice to the main contractor to show proof that the main contractor had paid the subcontractor. Such an assumption may be rebutted by the principal itself adducing evidence that it had either paid the main contractor or that there is otherwise no money outstanding at the moment of the receipt of the written request from the subcontractor for the

principal to make a direct payment to the subcontractor under s 30(1).

> [54] The respective legal and evidential burden with respect to the fulfilment of the 4 conditions referred to by Wong Kian Kheong J (now JCA) in *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 1 LNS 187 was further expounded by his Lordship in *LTK Facade Specialist Sdn Bhd v Sri Mutiara Development Sdn Bhd and other cases* [2021] MLJU 1185; [2021] 1 LNS 1030 ...
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> [55] As the assumption and initial evidential burden is discharged by the subcontractor as above stated, the evidential burden then shifts to the principal to show proof that there is no amount owing by it to the main contractor. That it may show by adducing credible evidence of a bona fide dispute with its main contractor and documents to substantiate that there is no money owing at that moment.

[53] It is rather obvious that it would difficult for the plaintiff as the subcontractor to prove a negative that it had not been paid. Parliament had thus required of the principal to notify its main contractor in writing to confirm whether or not payment had been made by the main contractor to the subcontractor the adjudicated amount.

[54] Parliament recognised the fact that the best person to verify if payment had been made to the subcontractor pursuant to an adjudication decision obtained against the main contractor is the main contractor itself. As the principal JKR here did not give a written notice and did not state why it did not so do, the initial evidential burden on the plaintiff subcontractor had been discharged with respect to the fact that it had not been paid by the main contractor, JKR.

[55] With respect we are unable to agree with the High Court below when it held as follows:

> [19] From the facts before me, I am not satisfied that the burden of proving that Nukima has yet to pay the adjudicated sum as required under s 30(3) of the CIPAA has been fulfilled. I have found that there is no evidence before this Court of the said adjudicated sums as not being paid or satisfied by Nukima despite the High Court in Terengganu allowing KSB's order to enforce the AD against Nukima on 7 November 2023.

[56] It would be against the weight and preponderance of evidence as no where did the principal say that NSB had paid KSB the adjudicated amount. All that the principal said was that there is no money due or payable from it to NSB. In the absence of evidence to the contrary, the subcontractor's evidence of non-payment by its main contractor of the adjudicated amount as stated in para 14 of its affidavit-in-support of its application dated 4 December 2023 should be accepted as true. It would be a case of the subcontractor deliberately misleading the court and swearing a false affidavit if indeed the subcontractor

had been paid by its main contractor and yet swearing an affidavit denying that. See also the same approach taken in the Court of Appeal's case of *Pali PTP Sdn Bhd v Bond M&E Sdn Bhd and another appeal* [2023] 6 MLJ 176.

[57] The appellant filed its application with the High Court on 5 December 2023 and duly served it on the defendant. Section 30 proceeds from the assumption that as the subcontractor has not been paid, it is generally because the main contractor, who ordinarily would be making the payment, has not paid since it has not been paid by its employer, the principal in that chain of construction contracts.

[58] In such an instance as alluded to above, the principal, upon confirmation from the main contractor, would make a payment direct to the subcontractor as envisaged in s 30(3) provided that there is money due or payable by the principal to the main contractor — a pre-requirement under s 30(5) which reads as follows:

> (5) *This section shall only be invoked if money is due or payable by the principal* to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1). (Emphasis added.)

[59] We would not go so far as to hold that the failure of the principal to give a written notice under s 30(2) is invariably fatal in all cases. However, the use of 'shall' in s 30(2) in that upon receipt of the written request under sub-s (1), 'the principal shall serve a notice in writing' on its main contractor against whom the subcontractor had obtained an adjudication decision, does convey a certain mandatory need to comply. A non-compliance would be a factor to be taken into consideration in considering if there is money 'due or payable' from the principal to the main contractor and where circumstances justify, to even draw an adverse inference against the principal under s 114(g) of the Evidence Act 1950.

[60] Such an approach would strike a middle ground between two sets of cases stating categorically that a non-compliance by the principal with s 30(2) on service of a written notice on its main contractor would be fatal and cases falling on the other side stating that it is not fatal and that the precondition of money 'due or payable' from the principal to the main contractor must first be met.

[61] The former set of cases are represented by *PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* [2020] MLJU 118 and *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347. The latter by *Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case* [2020] MLJU

A 2389; [2021] 2 AMR 601 and *Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd* [2021] MLJU 474.

[62] The principal need not slavishly follow the scenario set out in s 30(2) if the principal has no money 'due or payable' to the main contractor, in which instance it would give notice to the main contractor to state so and the main contractor may respond to dispute that assertion of the principal. The main contractor may choose to intervene in the proceedings when filed or alternatively to file an affidavit-in-support of the subcontractor's claim for direct payment from the principal, as a direct payment from the principal would obviate the need for the main contractor to pay the subcontractor.

[63] In the absence of the principal giving a notice under s 30(2) or in its modified form to the main contractor, the court would have to be satisfied if there is credible evidence to show that there is no money 'due or payable' from the principal to the main contractor. Whether or not the court would be drawing an adverse inference would depend on the circumstances of each case including whether there is reason for the principal to suppress any evidence not to its favour. See s 114(g) of the Evidence Act 1950.

[64] It is certainly a factor to be taken into consideration in the absence of an explanation from the principal as to why it had not served a written notice on its main contractor to elicit a confirmation or otherwise as to whether the main contractor had paid the subcontractor the adjudicated amount and more so when the plaintiff had specifically drawn the principal's notice to s 30(2) of the CIPAA.

[65] Only the principal would be in a position to state in its affidavit to oppose the s 30 application as to whether it has so served the notice under s 30(2) on its main contractor stating that direct payment would be made after the expiry of ten working days of the service of the notice or that no payment would be so made as there is no sum due or payable from it to the main contractor.

[66] All is not lost by the principal if it had not so served the notice under s 30(2) on its main contractor as it must then independently and upon credible and cogent evidence, satisfy the court that there is nevertheless no amount owing from it to the main contractor for the reasons given. This is not least because s 106 of the Evidence Act 1950 provides that:

> 106 Burden of proving fact especially within knowledge
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> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[67] The other party that could help establish if there is money 'due or payable' from the principal to the main contractor would be the main contractor but here since no written notice was given by the principal to the main contractor under s 30(2), the main contractor may not be aware of this application and so we are bereft of any evidence that may be forthcoming from the main contractor.

[68] This court would have to scrutinise the assertions of the principal JKR and the evidence in support of those assertions, so as to see if the principal has discharged its evidential burden that it does not owe the main contractor but instead the main contractor owes the principal.

[69] It is not disputed that there is a sum of RM6,269,518,98 being retained by JKR which JKR called performance guarantee sum which sum is deducted from each IPC to the tune of 10% until the retention sum is 5% of the contract sum stated as RM125,390,379.66 as can be seen in item 1 below, being the KSB's table of money due or payable from JKR to NSB:

No	Matter	Amount (RM)
		125,214,833.13
1	Main contract sum (ie, RM125,390,379.66) x 99.86% (Project's progress as at the date of the termination notice dated 14 July 2022)	(4,191,765.73)
3	(Less) previous interim payments	(109,516,812.62)
4	(Less) retention sum	(6,269,518.98)
5	(Less) ascertained liquidated damages at RM23,532/day for 101 days	(2,376,732.00)
	Difference payable (RM)	2,860,003.80

[70] Upon termination by JKR of the PWD contract with NSB, the said retention sum would have to be dealt with in accordance with the terms of the contract. What is pertinent to note is that in JKR's notice of termination to NSB dated 14 July 2022, JKR reminded NSB that it shall be liable for all additional costs incurred by JKR arising out of the said termination and the performance guarantee sum would be forfeited in accordance with cl 10.7 of the contract.

[71] Later in JKR'S letter dated 9 October 2023 to KSB, it stated that it would be making a claim for termination costs against NSB pursuant to cl 60.1 of the PWD contract and that the performance guarantee sum would not be returned.

A **[72]** One would have expected JKR to follow up with its obligation under the PWD contract with NSB since termination was on 14 July 2022 and the notice from KSB requesting JKR to make direct payment was on 11 September 2023. More than 14 months had passed and the completion was already 99.86% at the point of termination. After all the point to determine if there is
B money 'due or payable' by the principal to the main contractor is when the subcontractor made a written request for payment of the adjudicated amount from the principal.

C **[73]** In both the affidavits of JKR dated 9 January 2024 and 14 February 2024, filed 18 months after the termination of the contract, found in encl 4 pp 48–55 and pp 64–70 respectively, JKR was conspicuously coy about the certificate of termination costs generally prepared soon after the additional costs to engage a rescue contractor could be determined to complete the balance 0.14% of the works.
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[74] No explanation was forthcoming in JKR's affidavits as to why this certificate of termination costs could not be prepared. The need to produce this certificate of termination costs becomes more acute and relevant when there
E was no evidence of any list of defects exhibited nor the costs of defects rectification incurred. The value of the balance works was only RM4,690,435.13 going by JKR's own calculation at p 370 of encl 4 being extracts of the minutes of site meeting No 69/2022.

F **[75]** Moreover, all claims for the LAD had already been made to the sum of RM2,376,732 until termination and JKR had not stated what other heads of claims it has against NSB.

[76] This sum would have to be paid to the rescue contractor engaged to
G finish the balance uncompleted works and even if the costs would be higher as it is always more costly to get someone to finish a small portion of balance works and not forgetting the rise in the costs of materials with the passage of time, still JKR must be candid to disclose what are the additional costs.

H **[77]** It is not disputed that the retention sum or performance guarantee is RM6,269,518.98. Is JKR suggesting that the whole of that sum was utilised to bear the additional costs in completing the works in which case, it would be more than a 100% increase in the costs of completion for the balance 0.14% of the works?!
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[78] Indeed, JKR had not disclosed what constituted this balance 0.14% of the works and we have to surmise from the documents exhibited that it could be certification and commissioning works, furniture and fittings and mainly non-structural works.

[79] Whilst contractually JKR may forfeit the performance guarantee sum, it must give an accounting of it when challenged by KSB who only needs to show that there is money 'due or payable' to NSB by JKR on the balance of probabilities. JKR, being the party that has knowledge of this amount, must bear the evidential burden of substantiating what it said that with respect to all money 'due or payable', that has been paid to NSB and that it is NSB that owes it money. If that is so one would have expected JKR to issue a notice of demand to NSB or at least produce its final statement of account with documents substantiating the balance due from the main contractor.

[80] Clause 65.0 on 'certificate of termination costs' provides as follows:

> 65.0 CERTIFICATE OF TERMINATION COSTS
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> 65.1 As soon as the arrangements for the completion of the Works made by the Government enable the P.D to make a reasonably accurate assessment of the ultimate cost to the Government of completing the Works following the termination of the Contractor's employment and the engagement of other contractors or persons, and the amount of direct loss and/or damage caused to the Government due to the termination has been ascertained by the P.D then the P.D may issue a certificate (hereinafter referred to as the "Certificate of Termination Costs") stating the Completion Cost (hereinafter defined) and the Final Contract Sum (hereinafter defined).
>
> 65.2 The Completion Cost comprises the following sums, costs or expenditure:
>
> (a) the sums previously paid to the Contractor by the Government;
>
> (b) the sums paid or payable to other contractors or persons engaged by the Government to complete the Works;
>
> (c) any sums paid to sub-contractors or suppliers under clause 60.1(c)(i)(E);
>
> (d) any costs or expenditure incurred or to be incurred including On-cost Charges incurred by the Government in completing the Works; and
>
> (e) the amount of direct loss and/or damage caused to the Government due to the termination.

[81] Whether or not there is a balance outstanding would be known once the above exercise is undertaken and if that has not been done, the court would expect some cogent reasons to be given. The accounting and arithmetic of it is as follows:

> 65.4 The Certificate of Termination Costs shall state the difference between the Final Contract Sum and the Completion Cost. If the Final Contract Sum is less than the Completion Cost, the difference shall be a debt payable by the Contractor to the Government and if greater the difference shall be a debt payable by the Government to the Contractor.

[82] In fact, JKR has selectively referred to and exhibited only some clauses in its PWD contract. One would have expected the whole of the PWD Form DB (Rev 1/2010) to have been exhibited but instead we only have clauses singled out and exhibited such as cl 13 performance of the works, cl 13 interim payments and cl 40 subcontracting and assignment. Such a selective reference does not assist the court in interpreting the relevant provisions against the context of the whole agreement.

[83] In the absence of cogent reasons why JKR had not been able to finalise or had not exhibited the certificate of termination costs after some 18 months had passed since it terminated the PWD contract with NSB, this court must draw an adverse inference against JKR. Section 114(g) of the Evidence Act 1950 provides as follows:

> 114 Court may presume existence of certain fact
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> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ...
>
> (g) *that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;* (Emphasis added.)

[84] Surely JKR cannot be said to have proved that there is no money 'due or payable' to NSB by its mere say so with no documents substantiating it with respect to how it had utilised the performance guarantee sum forfeited.

[85] If, as JKR argued the certificate of making good defects has not been issued yet then the question is why has it not been issued. There is no evidence of a list of defects which NSB is to attend to and no evidence of costs incurred in rectifying defects. As JKR had terminated the PWD contract with NSB on the latter's failure to proceed regularly and diligently with the performance of its obligations under the contract as specified in cl 60.1(a)(iii), NSB had to vacate the site under cl 60.1(c)(i)(C) to remove its personnel and workmen from the site and under (D) to vacate the site.

[86] More than that under cl 60.1(c)(i)(E)(aa), NSB is required to terminate all third party contracts and so it did forthwith terminate its subcontractor KSB. It would appear then that all rectification works if there are defects would have to be done by the principal or its rescue contractor but there is no evidence as to what was rectified and the costs of rectification.

[87] In *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd*

and another case [2021] 8 MLJ 347, Lim Chong Fong J (now JCA) in a case where the plaintiff had made a s 30 of the CIPAA application for direct payment from the principal as defendant and the principal had not served a written notice on its contractor as required under s 30(2), the High Court held that an adverse inference is to be drawn against the defendant for its final account statement which was produced unilaterally by the defendant without the acceptance or endorsement of CTSB, its contractor, in breach of the principal contract.

[88] His Lordship Lim Chong Fong J (now JCA) further noted that the defendant's statement of final account which was exhibited in the defendant's affidavit-in-reply comprised of the master summary, subsummaries and several payment vouchers as well as bank balance statements relating to payment of the progress certificates only. Reference was made to the Court of Appeal case of *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 where a statement of account has little, if no, evidential value in the absence of cogent substantiating documents in support.

[89] In allowing the application for a direct payment order from the principal His Lordship concluded as follows:

> [37] Nonetheless and in *the absence of the aforesaid supporting documents, I am satisfied that there is* still substantial sum of unquantified and uncertified final value of work done as well as r*elease of retention money of RM518,620.61 which has not been accounted by the defendant for the period that elapsed between the termination of the contract and rental agreement and the defendant's receipt of the notices under s 30(1) of the CIPAA. It was for about nine months*. The unquantified and uncertified final value of work done may be ascertained from the final claim of CTSB which would ordinarily have been submitted pursuant to cl 5 of the principal contract. *The production of the final claim has been withheld by the defendant here unexplained and I am accordingly inclined to draw an adverse inference against the defendant*. I believe that the first claim would reveal a substantial sum payable to CTSB. (Emphasis added.)

[90] In the present appeal, there was no certificate of termination costs produced and the lapse of time between the termination of the main contract on 14 July 2022 and service of the written request under s 30(1) of the CIPAA on 11 September 2023 was some 14 months and some 18 months when JKR filed its first affidavit to oppose the application on 9 January 2024. An adverse inference is to be withdrawn and in the absence of more cogent evidence, JKR had not discharged its evidential burden of proving that there is no money 'due or payable' to the main contractor from the retention sum.

[91] There is yet another approach to dealing with retention sum that is being retained by the principal which is derived from work actually done by its

main contractor. In the High Court case of *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, garnishee)* [1988] 1 MLJ 444, His Lordship Peh Swee Chin J (later FCJ) dealt with retention sum held by an employer where a percentage (in our case a 10%) of value for work done by the contractors are deducted and retained by the employer in order to have recourse to it later, usually for making good any defect in such work.

[92] In that case the subcontractor plaintiff as a judgment creditor had obtained judgment against the main contractor defendant as judgment debtor. It was provided for in cl 30(4)(a) of the building contract between the garnishee employer and the judgment debtor contractor that the employer's interest in any amount do retained shall be fiduciary as trustee and the employer shall have recourse thereto for payment of any amount which he is entitled under the contract to deduct from any sum due or to become due to the contractor. It was further provided in cl 30(4)(b) that the first moiety shall be released upon the architect issuing the certificate of practical completion and under cl 30(4)(c) the balance upon the expiration of the defects liability period or on the issue of the certificate of completion of making good defects, whichever is the later.

[93] A garnishee order to show cause was served on the garnishee on 18 September 1986 and the employer terminated its contractor on 22 September 1986. The garnishee contended that the retention was not due and payable to the judgment debtor because the contract had been terminated and that the employer garnishee is entitled to damages and accounts were being prepared to determine the amount of damages for breach of contract.

[94] It was further contended by the employer garnishee that by virtue of cl 30, if at all the retention money was payable to the judgment debtor, the architect had not issued the 'certificate of practical completion' or the 'certificate of completion of making good defects'. His Lordship in dismissing the appeal of the garnishee held at pp 447–448:

> Garnishee proceedings are but execution proceedings also, except that instead of chattels, debts are attached. I do not think it can be disputed that a debt is only attachable when it is an existing debt, or a debt that has already accrued; the authority for this proposition is *Dunlop & Ranken Ltd v Hendall Steel Structures Ltd (Pitchers Ltd Garnishees)* [1957] 3 All ER 344 (1).
>
> Such an existing and accrued debt is still attachable even though in future, that is, such a debt is of a description mentioned by Bankes LJ in *O'Driscoll and another v Manchester Insurance Committee* [1915] 3 KB 499 (2) as *debitum in presenti solvendum in futuro* and such debt was described by Bankes LJ as attachable.
>
> ...
>
> One cannot lose sight of the fact also that the retention sum was deducted for value

of work already and actually done and materials already and actually supplied as certified by the architect to be due.

In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment of notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment-debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

Although cl 30(4)(b) and (c) provide for even two certificate of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provide for deferred payment only, mentioned by me earlier, as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment.

[95] There was also another High Court case involving retention sum with respect to a construction claim in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee)* [1988] 1 MLJ 434 where His Lordship Lim Beng Choon J, stated succinctly that:

The sole issue arising from this appeal is whether the sum of $101,716.51, already earned by the judgment debtor in respect of the works which they had carried out under the contract for the construction of the Jitra/Alor Setar Highway Project, and which sum was retained by the garnishee as retention money for the purpose of compensating the latter for defects in the works carried out by the judgment creditor, could be garnished under O 49 r 1 of the Rules of the High Court 1980.

[96] His Lordship affirmed the decision of the registrar in attaching the said sum and at p 437 after reviewing the relevant English cases, distilled the following propositions:

(1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti*, of course an order can be made to attach the debt.

(2) If there is not a debt payable *in presenti,* but there is a debt in existence, *debitum in presenti,* but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.

(3) The words 'or accruing' are intended to apply to those cases in which there are *debita in presenti, solvenda in futuro* (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt; it must be shown that there is a debt.

(4) A *debitum in presenti* not yet actually payable is nevertheless a debt which is *represented by an existing obligation*.

[97] At p 438 the learned judge observed as follows:

> It may be true ... that the retention money is retained in the power of the garnishee as a fund to be drawn upon should the occasion arise to rectify defects in the work carried out by the judgment debtor. *But in garnishee proceedings the law would only acknowledge two kinds of debts, an existing debt payable in presenti or an existing debt payable in futuro. The law does not recognize a debt that probably will arise in the future or however likely it may arise* (see *Webb v Stenton and others, garnishees* (1883) 11 QBD 518 (2) at p 315).
>
> Putting the case of the garnishee at its highest, it has only shown to this court that within what is not usually known in most, if not all, building and engineering contracts as the defective liability period, the garnishee may discover some defective works which would enable it to make a cross-claim against the judgment debtor. But *in garnishing proceedings, the law is concerned only with any cross-claim or cross-debt existing at the date of the attachment and not a cross-claim or cross-debt that may come into existence some time in the future* (see the speech of Blackburn J in *Tapp V Jones; garnishee* (1875) LR 10 QB 591 (1) at p 593). For the reasons as stated above, I hold that the sum of $65,801.98 retained by the garnishee as retention money can rightfully be attached. (Emphasis added.)

[98] The dicta in the *Kedah Kelang Papuan Sdn Bhd* have been approved by the Court of Appeal in *Maybank Islamic Bhd v WWE Holdings Bhd* [2017] 4 MLJ 339, at [7] and [8]; and in *Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal* [2017] 4 MLJ 813, at [25] to [29].

[99] In *WWE Holdings* Her Ladyship Mary Lim JCA (later FCJ) observed as follows after approving the above four propositions of law alluded to above by His Lordship Lim Beng Choon J:

> [9] When dealing with competing claims, cross-claims or the right to set off in garnishee proceedings, the Federal Court's decision in *Saw Swan Kee v Sim Lim Finance (M) Bhd* [1985] 1 MLJ 221 must be considered. In that appeal, the issue was whether a garnishee has a right to set off against the debt attached by the garnisher a debt that the judgment debtor owes the garnishee. In other words, the judgment debtor owes both the garnisher and the garnishee. The Federal Court decided that in garnishee proceedings, the garnishee may set off against the debt attached a debt owed by the debtor to the garnishee provided the debt owed to the garnishee exists before the order nisi was made. On the facts in that appeal, the Federal Court was 'unable to find any credible evidence to show that on the relevant date (January 11, 1983) any actionable debt was in existence and payable to the garnishee from the judgment debtor'. For that reason, the Federal Court held that:
>
> > As there was at the material time no debt due and payable to the garnishee from the judgment debtor, the authorisation to pay by the judgment debtor does not have any effect ...

[100] In *Flextronics Technology (M) Sdn Bhd* the four propositions of His

Lordship Lim Beng Choon J was approved in the following terms and applied as follows:

> [29] These are sound fundamental propositions interpreting O 49 r 1 and we adopt the same. It is our view that even if we were to entertain Bumicircuit's complaints, which we refuse, Bumicircuit's complaints are of no merit. The phrase 'the amount of any debt due or accruing due to the judgment debtor from the garnishee' includes the debt that Flextronics owed Bumicircuit at the material time, *even if the payment is payable at a deferred date with the credit terms purportedly agreed between the parties. It would be different had the debt sought to be garnished was a contingent debt. Had that been the case, which in Flextronics 'case it was not, then as expressed in Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor, the 'debt' is 'strictly speaking not a debt at all'. The debt must be in existence at the time of the application, though the time for payment may be sometime in the future*. Since that was the case with the amount garnished, Bumicircuit's submission is of no merit. (Emphasis added.)

[101] Likewise, under a s 30 of the CIPAA application, when a written request is made on the principal under s 30(1) of the CIPAA to pay direct to the subcontractor, at that point the principal must have an actionable debt in existence and payable to the principal from the main contractor from which it may set off what it owes the main contractor under the retention sum of performance guarantee sum. There is no evidence of an ascertained sum arising from either defects to be rectified and additional costs required to employ the rescue contractor for the balance 0.14% of the works before one may know how much of the performance guarantee sum is needed to be utilised for this purpose.

[102] Even if there is such a debt due some time in the future, that is not relevant as we are concerned with the point when the written request for direct payment was made by the subcontractor on the principal. At that point in time there was already an existing debt owing by the principal to the main contractor that is attachable. It does not matter if that debt is payable on a deferred date because there is already in existence a present debt and not a contingent debt.

[103] We are not unaware of a contrary High Court case in *Binamin Mjc Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (encl 26)* [2001] MLJU 111; [2001] 6 CLJ 213 where Abdul Aziz Mohamad J, on similar facts, departed from the propositions of law held in *Kedah Kelang Papan Sdn Bhd* and that of *Lee Kam Chun*.

[104] In *Binamin MJC Quarry Sdn Bhd* it was held at p 219 as follows:

> To conclude, the retention sum in this case is not a debt due or accruing due from TSR to Way Soon. It is meant to be withheld by TSR pursuant to cl 24.1(d) of the subcontracts pending issuance of the certificate of practical completion and finalisation of the account. It is left to be seen how much of that sum, if any, would

A be available for payment to Way Soon at that stage. There might even not be anything left in favour of Way Soon. No part of that sum may be ordered to be presently paid to Binamin, as is their desire in the garnishee proceedings.

B **[105]** *Binamin MJC Quarry Sdn Bhd* was followed by Aliza Sulaiman J in another High Court case in *WTK Engineering Sdn Bhd v Seriemas Development Sdn Bhd* [2021] MLJU 520. For our part we do not think we should depart from the application of the doctrine of stare decisis where generally one Court of Appeal would be binding on another unless the later Court of Appeal is satisfied that the earlier Court of Appeal had been per in curiam in *Maybank Islamic Bhd v WWE Holdings Bhd* [2017] 4 MLJ 339 and in *Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal* [2017] 4 MLJ 813. See the principle enunciated in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293.

C

D **[106]** There is of course some subtle differences between a garnishment under O 49 r 1 of the Rules of Court 2012 ('the ROC') and an order for direct payment from the principal under s 30 of the CIPAA. Besides differences in procedure and the fact that one must be armed with a judgment of a court before proceeding as a judgment creditor for garnishment, the same is not necessary for the subcontractor that has an adjudication decision in its favour against the main contractor though in the present appeal, the subcontractor also happened to be a judgment creditor.

E

F **[107]** The crucial words appearing in O 49 r 1 of the ROC is that of '... the amount of *any debt due or accruing due* to the judgment debtor from the garnishee'. The words used in the over-arching provision of s 30(5) of the CIPAA are that: s 30 of the CIPAA shall only be invoked if money is 'due *or* payable' by the principal to the main contractor at the time of the receipt of the request under s 30(1) from the subcontractor that has an adjudication decision against the main contractor. We agree with Wong Kian Kheong J (now JCA) in *Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case* [2020] MLJU 2389 that the usage of the word 'or' as highlighted above in the phrase 'due or payable' must be read disjunctively as 'or' is the word giving an option between the two conditions of 'money due' or 'money payable'. We would add that to read it conjunctively as 'and' would be reading a meaning into the phrase not borne out by the word 'or'.

G

H

I **[108]** His Lordship Wong Kian Kheong J (now JCA) had also referred to the *Black's Law Dictionary* (9th Ed) as follows:

> [18] Secondly, as explained in *HSL Ground Engineering*, at [29], *the second limb (payable) of s 30(5) of the CIPAA is wider than its first limb (due)*. This is clear from the meaning of 'payable' as stated in 'Black's Law Dictionary':

Ninth Edition, at p 1243, as follows:

> payable, adj.... (Of a sum of money or a negotiable instrument) that is to be paid– *An amount may be payable without being due. Debts are commonly payable long before they fall due.* (Emphasis added.)

[109] In *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347, Lim Chong Fong J (now JCA) explained the meaning of money 'due or payable' as follows:

> [29] It is plainly provided in s 30(5) of the CIPAA that the defendant is only obliged to make direct payment *if there is money due or payable to CTSB. It is not due and payable.* In the English Court of Appeal case of *Videocon Global Ltd & Anr v Goldman Sachs International* [2016] EWCA Civ 130, it was held that there is a distinction between due and payable in that a debt accrues when it is due whilst an obligation to pay arises when it is payable. They are thus not synonymous and it seems that the former is stricter when compared to the latter ... (Emphasis added.)

[110] So long as the debt is present and existing that would more than satisfy the requirement that it is 'payable' quite apart from the fact that it would also be due as it is not a contingent debt. In the case of a contingent debt the existence of the debt is dependent on a contingency that may or may not happen and so there is no present obligation to pay. A debt is payable when the obligation to pay exists and the money is effectively owed even if the payment due date may be in the future as in awaiting the certificate of making good defects or the certificate of practical completion.

[111] The rationale is not difficult to find. Parliament must have intended a s 30 of the CIPAA enforcement to be different from a garnishment enforcement for otherwise it would stop at s 28(1) of the CIPAA when it had allowed an adjudication decision to be enforced as if it is a judgment of the High Court, giving the option to the judgment creditor to proceed with execution of the judgment by way of garnishment. Parliament does not legislate in vain and one must presume that the s 30 of the CIPAA application for direct payment from the principal is an additional enforcement mechanism for ss 28 and 30 are parked under Part IV of the CIPAA under 'Enforcement of Adjudication Decision'.

[112] It is precisely because of the peculiarity of the construction industry where in a chain of construction contracts, the subcontractor would be the party effectively and ultimately executing the construction works and the principal would be the ultimate beneficiary of the works and indeed retaining normally the 5% of the contract sum from what is due or payable to the main contractor that the CIPAA allows for the subcontractor to call upon the principal to make direct payment provided the four conditions housed in s 30

A are met. One does not have to imagine too hard to know that the retention sum retained by the principal is carved out from the works done ultimately by the subcontractor whose share in the retention sum would be proportionate to the reduced value of the subcontract when compared with the value of the main contract.

B

[113] Whilst the principal may have terminated its contract with the main contractor for cause such as the failure to proceed with the works regularly and diligently, the subcontractor's contract with the main contractor is required to be terminated by the main contractor upon the principal terminating the main C contractor. The reason for the principal to terminate the main contractor had nothing to do with any delay caused by or attributed to the subcontractor as its work is confined only to the IBS works for RM9.5m which the principal itself said had been completed as far back under IPC No 79 under Item 3.1.3 'Frame of the Building Works at Hospital Block'.

D

[114] Upon the main contractor terminating the subcontractor for the reason that the principal had terminated the main contractor, the subcontractor has the right to demand for the release of the retention sum of E RM927,300 which sum was allowed by the adjudicator in the adjudication decision. The undisputed retention sum of RM6,269,518.98 retained by the principal would be more than enough to satisfy the adjudicated amount together with interest and costs.

F **[115]** KSB as the subcontractor who did the IBS deserves to have the retention sum released because there has been no complaint of any defective works and has no role in the 0.14% of the uncompleted works. Parliament had thus allowed so much of the amount payable from the principal to the main contractor to be attached for direct payment to the subcontractor.

G

[116] The reason why Parliament had provided a recourse in s 30(4) of the CIPAA for the principal to recover the amount paid under s 30(3) as a debt or set off the same from any money due or payable by the principal to the main contractor envisages and anticipates that there may well be instances when after H payment out to the subcontractor there may finally be a negative amount in that it is the main contractor that owes the principal. This can only be ascertained if there is a certificate of termination costs issued which for reasons best known to JKR it is not prepared to share in its affidavits opposing the s 30 of the CIPAA application. Such a negative amount may be claimed by the I principal as a debt from the main contractor or to set off the same against any money 'due or payable' from the principal to the main contractor.

[117] If JKR had served the written notice under s 30(2) on the main contractor and the main contractor had disputed the certificate of termination

costs issued, then depending on the quality of the evidence adduced, it may be said that there is a bona fide dispute between the principal and the main contractor such that at the point of service of the written request to pay by the subcontractor, the principal JKR by adducing some credible evidence had discharged its evidential burden of showing that there is no money 'due or payable' to the main contractor.

[118] In the light of the Federal Court case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723, it is no longer sufficient for a party to the contract where there is an agreed sum to be forfeited to argue that the whole of it was justifiably forfeited when challenged without the need to produce evidence to justify the same. This is more so when LAD had already been charged until termination of the contract and the balance uncompleted works is a mere 0.14% which according to JKR only amounted to RM4,690,435.13 going by JKR's own calculation at p 370 of encl 4 being extracts of the minutes of site meeting No 69/2022.

[119] We understand that in most cases the challenge that the amount to be forfeited is unreasonable, unconscionable or penalty in nature would be from the main contractor whose contract the principal had terminated. However, as the principal had not given a written notice to the main contractor pursuant to s 30(2) of the CIPAA, the main contractor is not given an opportunity to be heard. Under such a circumstance we find that the challenge may be raised by the subcontractor that is interested in whether there is money 'due or payable' to the main contractor from the retention sum or the performance guarantee sum.

[120] The following principles distilled by the Federal Court in *Cubic Electronics* would be relevant in the context of the forfeiture of an agreed sum under the Contracts Act 1950:

> [74] In summary and for convenience, the principles that may be distilled from hereinabove are these:
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> ...
>
> (iv) In determining what amounts to 'reasonable compensation' under s 75 of the Act, the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* (supra) are relevant.
>
> (v) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.
>
> (vi) Section 75 of the Act allows reasonable compensation to be awarded by the

court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.

(vii) The initial onus lies on the party seeking to enforce a damages clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

(viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.

[121] As stated cl 65.1 provided a methodology for JKR to, as soon as the arrangements for the completion of the works made by the Government enable the P.D to make a reasonably accurate assessment of the ultimate cost to the Government of completing the works, a certificate of termination costs would be issued so that under cl 65.4 'if the Final Contract Sum is less than the Completion Cost, the difference shall be a debt payable by the Contractor to the Government and if greater the difference shall be a debt payable by the Government to the Contractor'.

[122] In the absence of any explanation as to why such a certificate of termination costs have not been prepared and produced, this court is entitled to draw an adverse inference against JKR.

[123] We are more than satisfied for the reasons given above that JKR had not discharged its evidential burden of showing that there is no money 'due or payable' to the main contractor NSB which KSB may attach for so much as is represented in the adjudicated amount in the adjudication decision that it had obtained against the main contractor and for which it had also enforced as a judgment of the High Court under s 28 of the CIPAA.

DECISION

[124] We were thus constrained to set aside the order of the High Court in dismissing KSB's application for an order for direct payment by the principal JKR of the adjudicated amount. Following the Court of Appeal's case of *Pali PTP Sdn Bhd v Bond M&E Sdn Bhd and another appeal* [2023] 6 MLJ 176, the adjudicated amount shall include the interest and costs.

[125] Having found merits in the appeal, we allowed the appeal and granted

an order in terms of prayers 2(a) (adjudicated amount RM927,300); (b) (interest as prayed for); and (c) costs of RM43,487.02) in the OS (encl 3 pp 33–37) for direct payment from JKR to KSB and costs of RM20,000 here and below.

Appeal allowed with costs of RM20,000 here and below.

Reported by Dzulqarnain Ab Fatar